



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108-1598

219878

MARTHA COAKLEY
ATTORNEY GENERAL

(617) 727-2200
www.ago.state.ma.us

July 30, 2007

BY ELECTRONIC FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S W
Washington, DC 20423-0001

FILING FEE WAIVED

Re: New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway –
Construction, Acquisition and Operation Exemption – in Wilmington and
Woburn, MA, STB Finance Docket 34797

Dear Secretary Williams

The Commonwealth of Massachusetts through the Massachusetts Department of
Environmental Protection and the Attorney General's Office attaches for filing the enclosed
Petition for Reconsideration, or in the Alternative, for Clarification in the above-referenced
matter

Please call me at x2418 if you have any questions about or problems with the enclosed
document. Thank you for your attention and assistance in this matter.

Very truly yours,

Siu Tip Lam

Siu Tip Lam
Assistant Attorney General
Environmental Protection Division

cc: Michael W. Dingle, Esq.
Service List

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

NEW ENGLAND TRANSRAIL, LLC. d/b/a WILMINGTON & WOBURN TERMINAL
RAILWAY – PETITION FOR AN EXEMPTION FROM 49 U.S.C. § 10901 TO ACQUIRE,
CONSTRUCT AND OPERATE AS A RAIL CARRIER ON TRACKS AND LAND IN
WILMINGTON AND WOBURN, MASSACHUSETTS

**COMMONWEALTH OF MASSACHUSETTS'
PETITION FOR RECONSIDERATION,
OR IN THE ALTERNATIVE, FOR CLARIFICATION**

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Michael W. Dingle
Senior Counsel
Office of General Counsel
Department of Environmental Protection
One Winter Street
Boston, MA 02108
(617) 292-5959

MARTHA COAKLEY
ATTORNEY GENERAL

Siu Tip Lam
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

Dated July 30, 2007

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

NEW ENGLAND TRANSRAIL, LLC, d/b/a WILMINGTON & WOBURN TERMINAL RAILWAY – PETITION FOR AN EXEMPTION FROM 49 U.S.C. § 10901 TO ACQUIRE, CONSTRUCT AND OPERATE AS A RAIL CARRIER ON TRACKS AND LAND IN WILMINGTON AND WOBURN, MASSACHUSETTS

**COMMONWEALTH OF MASSACHUSETTS'
PETITION FOR RECONSIDERATION,
OR IN THE ALTERNATIVE, FOR CLARIFICATION**

Pursuant to 49 CFR 1115.3, the Commonwealth of Massachusetts through the Attorney General's Office and the Massachusetts Department of Environmental Protection petitions the Board for reconsideration, or in the alternative, for clarification of its decision served on July 10, 2007 ("Decision"), in this matter

BACKGROUND

New England Transrail, Inc. d/b/a Wilmington & Woburn Terminal Railway ("NET") proposes to operate as a rail carrier and to handle and transload, among other things, municipal solid waste ("MSW") and construction and demolition debris ("C&D"), at a proposed facility on a contaminated property in Wilmington, Massachusetts. NET has petitioned for exemption from the licensing requirements of 49 U.S.C. § 10901. One of the issues presented in this proceeding before the Board is whether NET's proposed activities involving MSW and C&D at the facility would be integrally related to rail transportation and thus come within the scope of the Board's exclusive jurisdiction. By decision served on June 13, 2006 the Board called for comments from

all interested parties to address specifically this issue, and then following receipt of numerous comments, the Board scheduled a full day of oral argument on April 19, 2007 to further explore this issue

At the oral argument, and in response to several pointed challenges to NET's position in advance statements filed by interested parties with the Board, NET altered its previous description of proposed facility activities. In its new version, NET stated that it would (1) unload the MSW and C&D from trucks onto the concrete floor within the proposed facility and inspect each shipment to ensure that it is consistent with the terms of its bill of lading and that it contains no hazardous waste, (2) extract items such as refrigerators which the landfill or receiving facility would not take, (3) pick through the C&D to extract large pieces of metal and wood, set them aside temporarily, and then load them on top of rail cars to be shipped to landfills; (4) shred the remaining C&D to reduce it to pieces, which would then be loaded into rail cars via conveyor belts, and (5) bale and/or wrap bulk MSW prior to loading it onto rail cars. (Transcript of Apr 19, 2007 Hrg. ["TR"] at 132-36, 148-49. See also NET Written Statement, Apr 16, 2007 [NET Statement"], at 25-26, 30, Ex. A attached to Supp. Verified Statement of Robert W. Jones, III, Apr 19, 2007 ["Jones Supp. V.S."], ¶¶ 1-5.)

NET stated for the first time at the hearing that it would not extract metal and wood, which have significant value, for sale or recycling to generate revenue; rather, it would sort and segregate the metal and wood just to load them separately on top of the car loads of C&D to be shipped to landfills. (TR at 149-50; Ex. A to Jones Supp. V.S. ¶¶ 1-6, 8-9.)

BOARD DECISION

In its Decision, the Board concluded that the (1) loading and unloading of solid waste, (2) temporary storage of solid waste prior to loading it onto railcars and for the purpose of allowing

time to arrange for delivery of rail cars for loading, and (3) baling and wrapping of MSW to permit a wide variety of rail cars to be used, are each, as presented in this proceeding, integrally related to rail transportation and that they are within the Board's exclusive jurisdiction (Decision at 14.) In addition, the Board ruled without discussion that "extracting refrigerators, so to avoid a legal impediment to the delivery of a shipment at a receiving landfill, would be part of rail transportation and covered by Federal preemption." (Id.)

The Board concluded that NET's explanation of its purpose in seeking to shred solid waste and move it by conveyor belt was not credible, and that the shredding activities would not be subject to the Board's jurisdiction or covered by Federal preemption. (Id. at 15.) In reaching this conclusion, the Board found that shredding of C&D is not required to pack solid waste into railcars. (Id. TR at 350) Rather, shredding and moving C&D by conveyor belt were used in the solid waste processing business to enable easy extraction of valuable materials, such as metal or wood, for recycling and sale purposes. (Decision at 14-15.) The Board disbelieved NET's claim that it would design its facility and operations to create easy access to the waste stream and then not capitalize on the opportunity to separate and sell valuable recyclable material. (Id. at 15)

Commissioner Mulvey dissented from the Decision (Id. at 19-21) He found that MSW is inherently different from other commodities and that states and local governments have promulgated a comprehensive scheme of laws to protect the environment and their residents from the problems that accompany the handling and disposal of MSW. (Id. at 20) He argued that the states and localities are in the best position to protect the health and safety of their citizens and that these laws should not be preempted (Decision at 19-20)

ARGUMENT

Massachusetts asks that the Board reconsider or clarify its ruling concerning the extraction of refrigerators to avoid “legal impediments” to delivery to the receiving landfill. While undoubtedly not so intended, this ruling could be construed to bring within the ambit of federal preemption all solid waste processing activities, including recycling or other non-rail business services.

This is so because many states have adopted regulations that restrict the type of waste that landfills, transfer stations, and processing facilities may receive. (See David B. Ellis V S., attached as Ex C to Massachusetts Comments on Jurisdictional Question, Jul 13, 2006, ¶ 8; Ohio Comments, Jul 13, 2006, at 2; Charles G. Johnson V S. attached to Colorado Comments, Jul 13, 2006 ¶¶ 3-5; Idaho Comments, Jul 12, 2006, at 1; Illinois Comments, Jul 13, 2006, at 4-8, and New Jersey Dep’t of Env’tl Protection and New Jersey Meadowlands Comm’n Reply, Jan 27, 2006, at 1-2.) See also United Haulers Ass’n, Inc. v. Onyiah-Herkimer Solid Waste Mgmt. Auth., 550 U.S. ____ (2007), slip op. at 12 (regulation of solid waste management and disposal – traditionally a state police function – is the primary responsibility of the states). For example, a state may prohibit the disposal or transfer for disposal of materials, such as yard waste, tires, batteries, appliances and many different types of recyclable materials, including plastics, paper, cardboard, metal, and wood. See e.g., 310 Code of Massachusetts Regulations (“CMR”) 19.017. To the extent that these state law requirements are reflected in the contracts between the shipper and the receiving facility, one could argue that under the Board’s Decision, the state law requirements as well as the contracts could be considered “legal impediments” to the delivery of solid waste to a receiving facility.

Compliance with such state regulations and shipper-receiver contract restrictions typically involves extensive sorting, segregation, and extraction of waste material for disposal or recycling. All of these activities are characteristic solid waste processing activities. (See Decision at 14-15 [finding that shredding and use of conveyors to move shredded C&D are activities that facilitate the extraction of valuable materials for recycling]) If the Decision is construed to hold that such processing activities are integrally related to rail transportation when they are necessary to comply with “legal impediments” to the disposal of solid waste at a receiving facility, then this seemingly narrow exception will swallow the general rule of the Decision, which seeks to distinguish waste processing from activities that are integrally related to rail transportation. The Board should clarify the Decision to ensure that this distinction is maintained. Massachusetts respectfully suggests that sorting waste prior to shipment should be preempted from state and local regulation only where such sorting is necessary to comply with legal impediments to the transportation of such materials; preemption should not apply to sorting activities performed where there are legal and/or contractual restrictions on the receiving facility’s acceptance or disposal of certain types of waste, which do not affect rail transport of such material.

In the first place, a shipper of solid waste is responsible for ensuring that the waste meets the requirements of the disposal sites to which they choose to ship. The shipper contracts with the receiving facility for the disposal of the solid waste, and NET has conceded that it will not have any direct contractual relationship with the receiving facilities. (Ex A to Jones Supp. V S. ¶ 6) These “legal impediments” by state law or by contract thus apply to the shipper and/or the receiving facility and to the ability of the receiving facility to accept such waste. They do not apply to NET or the ability of NET to transport the waste.

Second, these “legal impediments” to the receiving facility’s acceptance and disposal of solid waste do not bar the movement or delivery of the solid waste by rail, even if it contains the prohibited or “noncompliant” material. Depending on the applicable state and local laws, a receiving facility may be required to have unloading areas where the sorting and extraction of prohibited material may be conducted after delivery. See e.g. Ohio Admin. Code 3745-400-11(F)(3) (requiring C&D facility operators to “deposit incoming loads of debris at a designated unloading zone where the debris shall be inspected and prohibited wastes shall be removed.”) Even if the receiving facility refuses a load, the rail carrier may transport the waste back to the shipper or deliver it to another destination that will accept the waste. Given NET’s acknowledgment that “[m]ost rail carrier waste contracts require the submission of proof, on request, that the consignee listed on the bill of lading has contracted to accept the cargo before the rail carrier will move the car,” it is most likely the shipper’s responsibility to bear the cost of storage, use of equipment, and shipment of the solid waste back to the shipper or to another destination. (Jones V S. attached to NET Petition. ¶ 17.) Therefore, any legal impediment to the disposal of solid waste at the receiving facility does not impede the transportation and delivery of the waste by the rail carrier, and the rail carrier’s sorting and extraction of the prohibited material prior to loading the waste onto rail cars are not necessary or integrally related to transportation.

Third, the shipper could choose to have the solid waste delivered via rail to a facility without such restrictions or to a processing facility for extraction of the prohibited material prior to disposal at the receiving facility that has such legal restrictions. The shipper also could choose to have the prohibited or “noncompliant” material sorted and extracted at a processing facility prior to tendering the load for rail transport. However, if the shipper chooses to ship the prohibited solid waste to a facility that does not accept such waste and a rail carrier is willing to

provide an inspection and extraction service to the shipper prior to rail transport, that is an added-value service, not a service integrally related to transportation. Indeed, NET acknowledges that the fee it receives from the shipper would include the cost for both rail transport and waste processing activities. (See TR at 143-44.) NET further suggested that if the sorting and extraction activities proposed to comply with the waste disposal requirements at the receiving facility were found to be beyond the Board's jurisdiction, NET would still be able to operate a solid waste transloading facility. (See NET Statement at 13. See also Decision at 14.) Thus, the value-added service is no different from the manufacturing or production services that the Board has already determined to fall outside the Board's exclusive jurisdiction. Cl. Borough of Riverdale – Petition For Declaratory Order – The New York Susquehanna and Western Railway Corp., STB Finance Docket No. 33466, at 9 (served Sept. 10, 1999) (manufacturing and processing activities not necessary for rail transportation fall outside of the Board's jurisdiction); Town of Milford, MA – Petition for Declaratory Order, STB Finance Docket No. 34444, at 1, 2 (served Aug. 12, 2004) (steel fabrication activities, e.g., cutting and welding of shipped steel, fell outside the definition of railroad transportation). See also Growers Marketing Co. v. Pere Marquette Ry. Co., 248 I.C.C. 215, 227 (1941) ("facilities provided for the display and sale of perishable produce delivered at the produce terminal are facilities for commercial transactions not part of transportation"), CFNR Operating Co., Inc. v. City of American Canyon, 282 F. Supp. 2d 1114, 1118 (N.D. Cal. 2003) (the distribution of pumice and cement to customers from rail yard was not transportation within the Board's jurisdiction).

The distinction between solid waste processing and activities that are integrally related to rail transportation should be maintained to ensure that the states can protect their citizens and the environment from problems that accompany solid waste processing while preserving the federal

preemption scheme under the Interstate Commerce Commission Termination Act. Therefore, for the above reasons, the Board should reconsider and clarify that (1) legal impediments to a receiving facility's ability to accept certain types of waste are not necessarily legal impediments to rail transport and delivery of the waste, (2) solid waste inspection, sorting, segregating, and extracting activities prior to shipment that may be necessary to comply with state or local law restrictions on the receiving facility, but not necessary to comply with restrictions on the transport of the solid waste, are not necessary or integrally related to transportation and are not covered under federal preemption, (3) such activities, taken to fulfill contractual agreements of the shipper, the receiving facility, and/or the rail carrier but otherwise not necessary for the rail transport of the materials, are not integrally related to rail transportation and are not covered under federal preemption, and (4) such activities taken to provide an additional service of processing the solid waste for recycling or disposal purposes are not integrally related to transportation by rail and not covered under federal preemption.

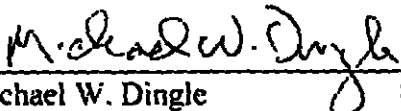
CONCLUSION

For the foregoing reasons, Massachusetts requests that the Board reconsider or clarify its Decision (served, July 10, 2007)

Respectfully submitted by.

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION


By:


Michael W. Dingle
Senior Counsel
Office of General Counsel
Department of Environmental Protection
One Winter Street
Boston, MA 02108
(617) 292-5959

Dated: July 30, 2007

MARTHA COAKLEY
ATTORNEY GENERAL

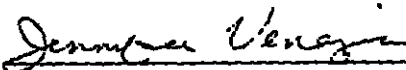
By:


Siu Tip Lam
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200, x2418

Dated July 30, 2007

CERTIFICATE OF SERVICE

JENNIFER VENEZIA
I, ~~Siu Tip Lam~~, certify that on July 30, 2007, I serve the foregoing Commonwealth of Massachusetts' Petition for Reconsideration, or in the Alternative, for Clarification on all parties to this matter by causing a copy thereof to be delivered by regular mail, postage prepaid, to each of the individuals or entities listed below


~~Siu Tip Lam~~

Service List

Daniel R. Deutsch
Paul R. Derensis
Deutsch Williams Brooks Derensis & Holland, P.C
99 Summer Street
Boston, MA 02110-1235

Patrick John Cane
Mercer County Improvement Authority
640 S Broad Street
Trenton NJ 08650

Honorable James R. Miceli
11 Webber Street
Wilmington, MA 01887

Arthur G. Marsilia
United Tool & Die Co., Inc
Eames Street
Wilmington, MA 01887

J. Patrick Berry
Jeffrey M. Bauer
Baker Botts LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004

Honorable James R. Miceli
Commonwealth of Massachusetts
Room 167, State House
Boston, MA 02133-1054

Stephen M. Richmond
Beveridge & Diamond, P.C
45 William Street, Suite 120
Wellesley, MA 02481

M. Barbara Sullivan
27 Gunderson Road
Wilmington, MA 01887-1546

Robert A Rio
Associated Industries of Massachusetts
P O Box 763
Boston, MA 02117-0763

Thomas E Dew
Berry Moorman
900 Victors Way, Suite 300
Ann Arbor, MI 48108-2705

Tim Conway
Joanna Jerison
U S Environmental Protection Agency, Region I
One Congress Street, Suite 1100
Boston, MA 02114-2023

Arthur Williams
National Black Agenda Convention Inc
P O Box 366211
Boston, MA 02136-9998

P Christopher Podgurski
Podgurski Corp
8 Springfield Avenue
Canton, MA 02021

Edward D Greenberg
David K Monroe
Galland, Kharasch, Greenberg, Fellman & Swirsky, P C
Canal Square, 1054 Thirty-First Street, N.W
Washington DC 20007-4492

Honorable Dianne Wilkerson
Massachusetts State Senate
State House
Boston, MA 02133-1053

Honorable Edward M Kennedy
United States Senator
2400 John F Kennedy Federal Office Bldg.
Boston MA 02203

Honorable John F Tierney
U S House of Representatives
17 Peabody Square
Peabody, MA 01960

Bill Phillips
Morristown & Erie Railway Inc
P O Box 2206
Morristown, NJ 07962-2206

Woburn City Council
City Clerk
10 Common Street
Woburn, MA 01801

Deborah L. Duggan
11 Hillcrest Street
Wilmington, MA 01887

John W Carrington
Hiram Grand Lodge A F & A M , Inc
98 Talbot Avenue
Dorchester MA 02124

Nyjah Wyche
Health Education and Learning Program for Black
Males Health
University of Massachusetts
100 Morrissey Boulevard
Boston, MA 02125

Frank S Demasi
26 MacArthur Road
Wellesley, MA 02482

Bill Owens
115 Hazleton Street
Martapan, MA 02121

Fred R Moore
6 Ella Street
Saugus, MA 01906

Linda Raymond
Woodburn Neighborhood Association, Inc
10 North Maple Street
Woburn, MA 01801

Honorable Edward J Markey
U S House of Representatives
Suite 101, Five High Street
Medford, MA 02155

Honorable John F Kerry
United States Senate
Washington, DC 20510

Woburn Neighborhood Association, Inc
10 North Maple Street
Woburn, MA 01801

Thomas McLaughlin
10 Common Street
Woburn, MA 01801

Wilmington-Woburn Collaborative
c/o Kathleen M. Barry
14 Powder House Circle
Wilmington, MA 01887

Paul J. Meaney
Woburn Business Association
P.O. Box 3057
Woburn, MA 01888

Ann L. Yurek
448 Shawsheen Avenue
Wilmington, MA 01887

Peter J. Shultz
CSX Corporation
500 Water Street
Jacksonville, FL 32202

John V. Edwards, Esq.
Zuckert, Scoutt et al
888 17th Street NW Ste 600
Washington, DC 20006-3939

John V. Edwards
Norfolk Southern Corp
Three Commercial Place
Norfolk, VA 23510

Susan Cleaver
109 Coleman Road
Goshen, NY 10924

Mark R. Reich
Kopelman and Paige, P.C.
101 Arch Street
Boston, MA 02110-1109

Paul G. Moates
Terence M. Hynes
Paul A. Hemmersbaugh
Sidley Austin LLP
1501 K Street NW
Washington, DC 20005

Bill Fischbein
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, OH 43216

Mark Wight
Illinois Environmental Protection Agency
P.O. Box 19276
Springfield, IL 62794

Honorable Robert A. Havern
Massachusetts Senate
4th Middlesex District, Room 1091D
State House
Boston, MA 02133-1053

Stephen R. Sasala, II
Waterbury Regional Chamber
P.O. Box 1469
Waterbury, CT 06721

Peter J. Shultz
CSX Corporation
1331 Pennsylvania Avenue, NW, Suite 560
Washington, DC 20004

Steven Armbrust
CSX Transportation, Inc
500 Water Street (J150)
Jacksonville, FL 32202

Thomas E. Farrell
1777 Market Tower
10 West Market Street
Indianapolis, IN 46204

Marlinda Duncanson
City of Middletown
16 James Street
Middletown, NJ 10940

Dean Ehler
Solid Waste Program Coordinator
Idaho Department of Environmental Quality
1410 N. Hilton
Boise, ID 83706

Louis P. Warchot
Association of American Railroad
50 F Street, NW, Suite 12041
Washington, DC 20001

Carter H. Strickland, Jr.
Rutgers Environmental Law Clinic
123 Washington Street
Newark, NJ 07102

Gordon P. MacDougall
1025 Connecticut Avenue, NW, Suite 919
Washington, DC 20036

Gi Steven Rowe
State of Maine
6 State House Station
Augusta, ME 04333

Richard E. Lotz
State of Colorado
Natural Resources & Environment Section
1525 Sherman Street 5th Floor
Denver, CO 80203

Honorable Steven C. Latourette
Chairman, Subcommittee on Railroads
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Kathleen M. Barry
Concerned Citizens Network
Wilmington Woburn Collaborative
14 Powder House Circle
Wilmington, MA 01887

James A. Hixon
Senior Vice President Employee Relations
Norfolk Southern Corp
Three Commercial Place
Norfolk, VA 23510-2191

Michael F. McBride
Leboeuf Lamb Greene & Macrae LLP
1875 Connecticut Avenue NW Suite 1200
Washington, DC 20009-5728

Eric S. Strohmeier
CNJ Rail Corporation
833 Carnoustie Drive
Bridgewater, NJ 08807

Neal Gross
Court Reporter
1323 Rhode Island Avenue NW
Washington, DC 20005-3701

Garland and Barbara Bradley
1229 Woodward Avenue
South Bend, IN 46616

Don M. Hahs
Brotherhood of Locomotive Engineers
1370 Ontario Street
Cleveland, OH 44113

Jonna Jerison
United States Environmental Protection Agency,
Region 1
One Congress Street Suite 1100
Boston, MA 02114-2023

Paul R. Hinchcock
CSX Transportation, Inc
500 Water Street, J-150
Jacksonville, FL 32202

James Riffin
1941 Greenspring Drive
Timonium, MD 21093

Dr. Daniel R. Niehrer
Transportation Preservation Society of Montana
P.O. Box 1004
Helena, MT 59624